

29.

Sir William Billers Knight, John Lawton and Nicholas Paxton Esquires, Trustees for certain Creditors of the Governor and Company of Undertakers for raising Thames Water in York Buildings, } Appellants.

His Grace Edward Duke of Norfolk, Sir Robert Clifton, Sir Robert Sutton, Lieutenant-General Wade, and } Respondents.
Others,

The Respondents CASE.

THE Respondents having taken from Sir Alexander Murray some Lead Mines lying in the County of Argyle, let the same to the Governor and Company of York-Buildings, for the Term of 25 Years, at the yearly Rent of 3600 l. and to secure the punctual Payment of the said Rent, the Company bound and obliged themselves to infeoff the Respondents in all their Estates in Scotland, to the End that they might thereout receive an Annuity or Rent-charge of 3600 l. yearly, during the said Term.

The Credit of the said Company being by their gross Mismanagement sunk to such a Degree, that their Bonds sold at a great Discount, they contrived a Scheme to trip up the Security which the Respondents had upon the Scotch Estates, and to charge the same with large Sums of Money for their own Use and Benefit and with the Payment of their Bonds, most of which were in the Possession of the Directors and Proprietors of the Company, preferably to the Respondents Demands.

Accordingly by Indenture between the said Company and the Appellants, the Company granted to the Appellants (by Way of Lease and Release, a Form of Conveyance unknown in Scotland) their several Lands and Tenements in Scotland therein mentioned, to the Intent and Purpose to raise Money for Payment of Bonds to be given or granted under the Seal of the Company to the several Subscribers to the Proposals thereunto annexed, and thereafter in Trust for the said Governor and Company.

The said Proposals annexed were for raising a Sum, not exceeding 100,000 l. for discharging the Company's Bonds, and enabling them to carry on their Works in Scotland, upon the Terms and Conditions following, viz. That the Subscribers do pay one fifth Part of the Sums subscribed in Money or Bonds, or Receipts, commonly called Slips, given for Bonds, within ten Days after Execution of the Deed of Trust: That the remaining four Fifths be paid in like Manner to the Company's Cashier, on or before the 25th of March next: That the Receipts signed by the Company's Cashier be given to each Subscriber for the first Payment, carrying Interest for the whole Sums subscribed from the Time of subscribing till the said 25th of March: That new Bonds bearing Date the 25th of March 1732, be given to the Subscribers, the Principle to be payable on the 25th of March 1735, and the Interest every half Year till that Time: That the Reversion of the Company's Estates in Scotland be vested in Trustees, as a collateral Security for the said Subscribers: That in Default of Payment of four Fifths of the Sum subscribed by each Person, on or before the 25th of March next, the Defaulter shall forfeit the first Payment of one Fifth to the Use of the Company.

The said Rent of 3600 l. not having been paid, and the Credit of the Company having greatly failed, the Respondents got an Inhibition against them (i. e. an Injunction to the said Company not to dispose of their Estates, so as to prejudice the Respondents Demands) and at the same Time executed a Summons of Adjudication for Payment of the Rent then in Arrear, and of the subsequent Rents that should grow due during the Continuance of the Lease. And in July following, as soon as the Days of the Summons were run out, it was inrolled, and when it was called before the Lord Ordinary on the 20th of the same July, the Company appeared, and, merely to gain Time to execute the fraudulent Scheme they were then contriving, insisted there could be no total Adjudication, because they would take a Day to produce a Progress (i. e. that they would convey Lands to the Respondents sufficient to answer Demands;) and the Ordinary assign'd them the 1st of November then next. But the Company never attempting to produce any Progress as they had undertaken, the Respondents after having been thus delay'd, at last obtained a Decree of Adjudication.

The Use the Company made of the Time thus given them, was to execute a Disposition to the Appellants, whereby they sell and dispone to them all their Lands and Estates within Scotland, as the same are more particularly enumerated and set forth in their original Rights and Infeoffments thereof, dispensing with the Generality of the said Disposition, upon the special Trusts and Confidences, and to the Intents and Purposes aforesaid (i. e. only and to none else) specified and contained in the said Deed of Indenture; then follows a Procuratory of Resignation and Precept of Seisin, neither of which do enumerate the Company's Lands and Estates, but the Precept bears a Warrant in general, to give Infeoffment, in all their Lands and Estates in Scotland, under the Reversion already mentioned, how soon and whensoever the said Sum of 100,000 l. mentioned in the said Indenture, or so much of the said Sum as is or shall be subscribed to the Proposals to the said Deed of Indenture annexed.

The Infeoffments taken in Virtue of the Precept, bear, that the Baillie (i. e. the Steward of the Granter of the Infeoffment, and to whom the Order for infeoffing is directed) had and held in his Hand the said Disposition of the 25th of October 1732, but not bearing, that he also held, or that there was produced or published by him, as the additional or subsidiary Warrant for his giving special Infeoffments, the Company's original Rights and Infeoffments in their respective Lands and Estates; notwithstanding whereof, the Baillie proceeds upon the sole Warrant of the general Precept to infeoff the Appellants, particularly, in all and singular the Lands and Tenements acquired by the Company in Scotland; and in order to supply the Defects of the Baillie's Warrant, the Notary, in extending the Instrument of Seisin, after reciting the Act of the Baillie in Execution of the Precept, which was the sole essential Act that could constitute a real Right, proceeds to recite as from himself and in his own Name, that to the Lands and Tenements above enumerated, in which the Baillie had so infeoff the Appellants, the Company had truly Right by Infeoffments or Conveyances of such and such Dates; which may be true, but none of these were produced to, or read or published by the Baillie, or his Order, in the Act of giving Infeoffment therein to the Appellants.

The Respondents got a Charter of Adjudication under the Great Seal, upon which they were infeoff in the Company's Estates with all possible Expedition on the Part of the Respondents, but they were delayed by the Opposition made by the Company, to the passing the Charter in the Exchequer.

And the Respondents, by virtue of the Company's Obligation of the 31st of July 1730, were again infeoff in their Estates at different Times from December 1733, and November 1734.

The

The *Respondents* having a direct and immediate Lien upon all the Company's Estates in Scotland, and apprehending this whole Transaction to be a fraudulent Contrivance to invalidate their Security, brought an Action of Reduction Improbation and Declarator, before the Court of Session in Scotland against the *Appellants*, as Trustees for the Company's Creditors, who stood in the Estates of the Company as aforesaid, and against many other Persons who were Creditors of the said Company by Adjudication, for producing all Bonds Dispositions Infeoffments and other Writings, granted to them with relation to the said Estates, and for voiding and setting aside the same.

February 1735-6.
April 1736.
June.

July 2.
October 25, 1732.

December 11.

When this Action came to be called, Certification (*i. e.* a Decree certifying and declaring that the Deeds called for, and not produced, are to be held as false and forged) was granted against the *Appellants*, and the Decree was extracted; but the *Appellants* applied to the Court by Petition, and therewith produced the said Indenture of the 18th of January 1731-2, with the said Proposals annexed, and Disposition, containing Procuratory of Resignation and Precept of Seisin, and the several Infeoffments which followed thereupon, and represented, that they had been produced in Court in another Action, when the said Certification was pronounced: Whereupon the Lords Reponed the Petitioners (*i. e.* *Appellants*) and notwithstanding the extracted Certification, allowed the Deeds and Writings then produced to be received in the Process, as if they had been produced at first: Tho' the *Respondents* acquiesced in the said Interlocutor; yet, to prevent Mistakes, they preferred a Petition to the Court, praying to have the same explained, by reason of the Ambiguity of the Words, Reponing the Petitioners (*i. e.* *Appellants*.) Upon advising whereof with Answers for the *Appellants*, the Lords Declared that the Certification shall stand good, and have its full Effect against all other Writs, except those produced with the foresaid Petition for the Defenders (*i. e.* *Appellants*.)

There appears subjoined to the said Proposals a List of Names, all written with one Hand, and without Date, and opposite to each Name, which are fifty-six in Number, a Sum set down amounting in the whole to the Sum of 72,645*l.* after which it is said, that the Company's Secretary by Order of the Directors, pursuant to a Resolution of a General Court held the 24th of March 1731-2, had signed for the Use of the Company 27,215*l.*

And it appears from the Company's Books that the whole Sum paid in to their Cashier in Pursuance of this Project in Money, was but 419*l.* 2*s.* 4*d.* and in old Bonds and Slips but 10,990*l.* 9*s.* 6*d.*—6,481*l.* 3*s.* 5*d.* of which belonged to the Proprietors of the Company themselves.

The Cause being brought to a Hearing before the Lord Drumore Ordinary, the Plaintiffs (*i. e.* *Respondents*) insisted, that the Indenture, Disposition, and Infeoffments in Favour of the *Appellants* were Deeds relative to a Subscription to be made, and to Bonds to be issued in Consequence thereof, but that it did not appear, that the said Project took Effect, or that any Person subscribed, or that any Bonds were issued to such Subscribers in Terms of the Conditions, for that the said Dispositions and Precept of Seisin is for Security of the Sums then to be subscribed to the Proposals annexed to the Indenture produced for the *Appellants*, and therefore that the said Disposition and Infeoffment should be set aside as *Sine Causa* or *propter Causam non Secutam*, there being no Ground or Voucher of any Debt to which they relate produced, or that then could be produced, because of the Decree of Certification aforesaid. That it being impossible to discover by any Record, who are the Persons for whose Behalf this Security is held, either the Decree given against the *Appellants* must conclude and affect these Creditors, or the Right created in their Favour must be void in Law. And that the Infeoffments were ineffectual in so far as it stood a Security for any Part of the Money subscribed for by the Company's Secretary, for that the Company could not create a Security to itself, and their attempting it was fraudulent, for the Secretary's Subscription was made at a Time too late for any other to subscribe in Terms of the Proposal.

July 26, 1736.

The Lord Ordinary was pleased of this Date to pronounce the following Interlocutor, "Sustains the Reason of Reduction founded upon the Decree of Certification, relevant to reduce the Indenture dated the 18th of January 1732. And the Disposition of the 25th of October 1732, under which the Defenders (*i. e.* *Appellants*) claim, except as to the Interest of Rowland Ainsworth, Samuel Grove, and Sir John Meres, who have taken a Day to produce their Grounds of Debt, and appear not as yet to be concluded by it, and discerns accordingly, and *separatim* sustains the Reason of Reduction as to the Sum of 27,215*l.* subscribed by the Company's Secretary, and finds the Company could not set up that Sum as a Debt, nor secure it by Infeoffment, to the Prejudice of the Pursuers (*i. e.* *Respondents*) anterior and lawful Debts; and so far also reduces and discerns, and finds that the Company's entering into the said Indenture with Sir William Billers, &c. to raise a Sum not exceeding 100,000*l.* for Payment of the Debts the Company owed by Bonds, and for carrying on their Works in Scotland, and yet by the Conditions thereto annexed, allowing the Subscribers to pay their Subscriptions by old Bonds or Slips, which could not answer the End proposed in the said Indenture, was a Fraud; and that such Payment by old Bonds or Slips, could not create an onerous Cause in Support of the Indenture and Disposition aforesaid, in Behalf of any Stockholder of the Company, to the Hurt or Prejudice of the Pursuers, who were lawful and anterior Creditors; and finds the said Reason of Reduction sufficiently proven; and therefore reduces the said Indenture and Disposition, and the Infeoffment following thereupon, so far as the same are claimed under by any Stockholder at the Time, or Purchaser of such old Bonds and Slips from such Stockholder, and Decerns, reserving to such Subscribers as paid ready Money to be further heard on their Interests as accords; and finds no Necessity to advise the other Reasons of Reduction and Answers thereto, but supercedes any Extract herein till the 10th of November next.

February 7, 1737-8.

The *Appellants* preferred a Representation to the Lord Ordinary, complaining of the said Interlocutor, to which the *Respondents* put in Answers; and the Cause being again heard, and the *Respondents* insisting, that the Disposition and Infeoffment following thereon was void, in regard it did not particularly mention the Names and Designations of the Creditors, in whose Behalf the Feoffment was granted. His Lordship did, of this Date, pronounce the following Interlocutor. "Having considered Representations and Answers with the foregoing Debates, adheres to his former Interlocutor, as to the three Points therein determined; but declares he will hear Parties Procurators further as to the Proof that old Bonds and Slips were retired in Place of paying Money upon the Plan of the Subscription mentioned in the Debate, but repels the Reason of Reduction: That the Disposition in Question, and Infeoffment following thereon, is null, as not mentioning the Names of the Persons and Sums due severally to them, in respect the Names of Trustees are therein mentioned, and the special Sum of 100,000*l.* but finds the Pursuers (*i. e.* *Respondents*) having called the said Trustees, they were not bound to notice nor call these for whose Behoof the Trust was created; and who, holding their Bonds by a blank Indorsement from a Servant of the Company's, could not be so known as to be made Parties to this Suit.

The *Appellants* preferred a Petition to the whole Lords, complaining of the said Interlocutors of the 26th of July 1736, and that of the 7th of February 1737-8, and the *Respondents* preferred a Petition to the Court, complaining of that Part of the Interlocutor of the 7th of February 1737-8, which repels the Reason of Reduction, that the Disposition in Question, and Infeoffment following thereon is null as not mentioning the Names of the Persons and Sums due severally to them, to which Petitions Answers were severally put in for both Parties.

The

November 17, 1738.

The Lords on Consideration of the said Petition preferred in the Name of the *Appellants*, and the Answers of the *Respondents*, by their Interlocutor of this Date, adhered to that Part of the Lord Ordinary's Interlocutor sustaining the Reasons of Reduction founded on the Decree of Certification; and it appearing to the Lords, that there were several Points in the Cause yet undetermined, which did not properly lie before them for their Determination, and both Parties desiring Determination upon the whole Cause, the Lords remitted both Petitions and Answers, excepting so far as they had adhered to the Lord Ordinary's Interlocutor, to hear Parties further on the Points already determined as well as on the other Points of the Cause in which no Judgment had been given, with Power to his Lordship to determine or Report.

The *Appellants* preferred another Petition to the Lords, complaining of that Part of the said Interlocutor of the 17th of November 1738, whereby they adhered to the Lord Ordinary's said Interlocutor, sustaining the Reasons of Reduction founded on the Decree of Certification, and praying the same to be reversed, or at least to allow them to be heard by Council on this Point, with the other Points remitted to be heard and determined by the Lord Ordinary. The Consideration whereof was by their Lordships also remitted to the Lord Ordinary.

And the Cause having, in Pursuance of the said Remit, been again brought to a hearing before the Lord Ordinary, it was insisted by the *Respondents* Council, that the Indenture, Disposition, and Infeoffment following thereon, in Favour of the *Appellants*, was void and ought to be set aside, for that the Disposition not having been granted for several Months after the *Respondents* had brought their Action of Adjudication, and had also served Inhibition against the said Governour and Company, that Deed of Disposition voluntarily granted, and the Infeoffments which followed upon it, being in Prejudice of them, who before then were just and lawful Creditors, ought therefore, and in Virtue of the Act of Parliament made in Scotland, Anno 1621, against unlawful Dispositions and Alienations, to be set aside. 2dly, That the Company had only a personal Right to the Estates of Marishal, Southesk and Linlithgow, and although the *Appellants* and *Respondents* are Infeoff in them, yet these Infeoffments being a non habente potestatem ought to be set aside, and the Competition tried upon the personal Right; and as this personal Right was conveyed by the Company to the *Respondents*, in and by the Contract and Articles, Anno 1730, it establishes in them a Title to the Rents and Profits of these Estates prior and preferable to the *Appellants*, whose Indenture and other Security were not projected for two Years after. And 3dly, That the Infeoffments, and Instruments of Seisin in Favour of the *Appellants* are void, for having proceeded without any Warrant or Authority, for tho' the Deed of Disposition, which was the Warrant and Foundation of such Instruments of Seisin, describes all the Lands, Lordships, Baronies and other Estates whatever, lying in Scotland in general only, yet these Instruments of Seisin bear, that the *Appellants* were infeoff in all the Lands and Estates of the Company by a very specifick Enumeration and particular Description of every Parcel of them, which being unwarrantable, ought therefore to be set aside.

January 12, 1738-9.

The Lord Drumore Ordinary, having reported the above Debate to the whole Lords, their Lordships by their Interlocutor of this Date, Sustained the Objection made to the Disposition dated the 25th Day of October, 1732. and Infeoffment following thereon, under which the Defenders claim: (Viz.) That it does not appear by the said Disposition and Infeoffments, that there was thereby any real Right created in the Estates of the York-Buildings Company or any of them, in Favour of any Persons certain, or for any certain or definite Sum; and therefore find the said Infeoffment void and null in Competition with the Pursuers; (i. e. Respondents) and adhere to their former Interlocutor, dated the 17th of November last; sustaining the Reason of Reduction, founded on the Decree of Certification relevant to reduce the Indenture dated the 18th January, 1732. and the Disposition, 25th October 1732, under which the Defenders claim: Except as to the Interest of those, who having taken a Day to produce their Grounds of Debt; and they also sustain the Reason of Reduction, (viz.) that there is no Enumeration of the Lands, Lordships and Baronies pertaining to the said Company, in the Precept of Seisin in the said Disposition, nor in the Disposition it self: Which was the only Warrant produced and published for taking the said Infeoffments; and they also sustain this Reason of Reduction, (viz.) That while the Pursuers were in the Course of obtaining an Adjudication against the Company, which was obstructed by the Company's taking a Day, or Term to produce a Progress, which they did not do, but suffered the Term to be circumduced (or foreclosed:) The said Company, did while that Term was current, grant the Disposition in Question, in Prejudice of the Pursuers Diligence by Adjudication, founded on anterior and lawful Debt contracted by the Company, in the Year One thousand seven hundred and thirty, by which the Company was obliged to infeoff the Pursuers (i. e. Respondents) in an Annual Rent of 3600l. Sterling, relevant to reduce the Disposition aforesaid: And also they find that the Company could not set up this Sum of 27,215l. Sterling, subscribed in Consequence of their Order, by their Secretary Henry Streachy, nor secure the same by Infeoffment to the Prejudice of the Pursuers, their anterior and lawful Creditors: And therefore so far sustain the Reason of Reduction of the Indenture, Disposition and Infeoffments aforesaid following thereon; and sustain this Reason of Reduction, (viz.) That the allowing Sums subscribed to be paid by the old Bonds or Slips, by any Stockholder of the Company, to entitle them to new Bonds to be issued the 25th of March, 1732, was a Fraud, and is relevant to reduce the new Bonds, Indenture, Disposition, and Infeoffments aforesaid, in so far as the same were given in Exchange for old Bonds, at the Date of the supposed Subscription, held by Persons, who then were Stockholders of the Company; and they find the Pursuers (i. e. Respondents) preferable to the Mails and Duties (i. e. Rents and Profits) of the Company's Estates of Marishal, Southesk and Linlithgow, at least to the Extent of 3600l. Sterling, yearly; being the Annual Rent in which the Company was obliged to infeoff the Pursuers, by Virtue of the Contract 1730 aforesaid; ay, and while the Company's Rights to these Estates shall be completed by Infeoffment therein; reserving to themselves, then to consider, whether the Pursuers (i. e. Respondents) Preference should continue after such Infeoffment shall be taken or not, and reduce, prefer, decern, and declare accordingly.

The *Appellants* have appealed against the said Interlocutor of the Lord Ordinary's, of the 26th of July 1736; and the 7th of February 1737-8; adhering to the said Interlocutor of the 26th of July, as to the three Points therein determin'd, and also against the Lords Interlocutor of the 17th of November 1738, and the 12th of January 1738-9, praying they may be reversed; but the *Respondents* humbly hope the said Interlocutors shall be affirmed, for the following, among other

R E A S O N S.

- I. **F**OR that by the Law and Practice of Scotland, it is beyond all Controversy, That Deeds and Writings called for, in an Action of Reduction and Improbation, and not produced, are by the Court to be certified and declared to be false and forged, and of no Validity nor Effect, as to the Pursuers of such Action; and the Infeoffment to the *Appellants* being indeed Nothing without producing the Vouchers for those Debts, for which it was said to be a Security, and so they being necessary Parts of that Deed, and not produced, they came under the Certification.

For

- II. For that by the Law of Scotland, confirmed by Repeated Judgments, no general or indefinite Burden can be created, or become a real Burden upon Lands, when it does not appear by the Infeoffment or Investiture, which constitute the Feudal Right, what the particular Sums, with which the Lands stand burdened are, and to what Persons the same are due: And therefore, as by the Disposition, dated the 25th of October 1732, and Infeoffments following thereon, under which the Appellants claim, it does not appear that there was thereby any real Right created, on the Estates of the York-Buildings Company, in Favour of any Person certain, or for any certain or definite Sum, the same ought to be set aside, and declared void and null.
- III. For that the Security pretended to have been created, by the Deed produced by the Appellants, supposing they were supported by the Production of Slips and Bonds, said to have been issued to the Subscribers, and had been devised and executed in a proper Manner, to create a real Security by the Law of Scotland, is yet reduceable by the Respondents, on the second Clause of the Act of Parliament, 1621, as being granted by the Company, as a Voluntary Right or Security to defraud the Lawful and more timely Diligence of the Respondents, who had not only served Inhibition, but had raised and executed Summons of Adjudication, long before the Disposition to the Appellants, and in Pursuance thereof did proceed duly to obtain Decreet of Adjudication, with Charter and Seisin thereon.
- IV. For that the said Infeoffment is void and null, as proceeding upon a general Precept, to infeoff the Appellants, in all and sundry the Company's Lands and Estates in Scotland, without enumerating these Lands and Estates, either in the Precept itself, or in the Disposition whereof it stands Part, which is a total Nullity of the Infeoffment following upon such general Precept, as being a thing utterly unknown in the Law or Practice of Scotland, and inconsistent with the known manner of constituting real and feudal Rights.
- V. For that while the Respondents were in the Course of obtaining an Adjudication against the Company, and after it might have been fully completed, had not the Company's Agent retarded it, by taking a Term to produce a Progress, which they never did, but suffered the Term to be circumduced, they thought fit, while that Term was current, to grant the Appellants the said Disposition, in Prejudice of the Respondents Diligence by Adjudication, founded on an anterior and lawful Debt contracted by the Company Anno 1730, whereby the Company were bound to infeoff the Respondents in an Annual Rent of 3600l.
- VI. For that the Company could not set up any Part of the Sum of 27,000l. said to be subscribed by their Secretary, for the Use of the Company itself, by an Order of the 24th of March, 1731-2. because the Company could at no Time create a Security for itself, and at that Time, it was too late for any Stranger to subscribe in Terms of the Proposals, which required one Fifth to be paid on or before the 28th of January preceeding, and the remaining four Fifths on or before the 25th of March thereafter: And that the said Infeoffment was also void, in so far as it stood as a Security for Bonds issued to the Proprietors or Stock-holders of the Company at that Time, when the Company was Bankrupt, and in such Circumstances, they could not effectually, in any known Form of Law, create a preferable Security to any Number of themselves, to the Exclusion of their prior Creditors.
- VII. For that the Company having become Debtors under their Seal to the Respondents in the yearly Rent of 3600l. for the Payment whereof the Company's Estates in Scotland were made a Security long prior to the said Deed under which the Appellants claim, it was both fraudulent and unjust in them to attempt preferring themselves to the Respondents, by allowing Sums subscribed to be paid by the Company's old Bonds and Slips (which were then at a very great Discount) by any Stockholder of the Company, to entitle them to new Bonds, which were to be an immediate Charge on the said Lands, as it was giving an undue Preference to themselves, to the Prejudice of the Respondents their fair and real Creditors; and was an Attempt to throw that, which was properly a Debt on their Stock here, upon their Estates in Scotland, upon which the Respondents had an immediate Lien before.
- VIII. For that as to the three Estates of Marisbal, Southesk, and Linlithgow, the Company had only a Personal Right, and when Rights are Personal, the first Conveyances denudes the Debtor, whether by Disposition or Adjudication; and that in the present Case, the Company had conveyed to the Respondents the Personal Right in Anno 1730, by a Deed containing Procuratory and Precept which entitles the Respondents to the Mails and Duties, till the Titles of both Parties are completed by Infeoffment.

For these and other Reasons the Respondents humbly hope the Interlocutors complained of shall be affirmed, and the Appeal dismissed with Costs.

JAMES ERESKINE,
W. MURRAY.

Sir William Billers Knigh, John Lawton and Nicholas Paxton Esquires, Trustees for certain Creditors of the Governors and Company of Undertakers for raising Thames Water in York Buildings. } Appellants.

His Grace Edward Duke of Norfolk, Sir Robert Clifton, Sir Robert Sutton, Lieutenant-General Wade, and others, } Respondents.

The Respondents C A S E.

To be heard at the Bar of the House of Lords, on Monday the 30th Day of April, 1739.